TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1904.

No. [redacted] 51.

FRED RASSMUSSEN, PLAINTIFF IN ERROR,

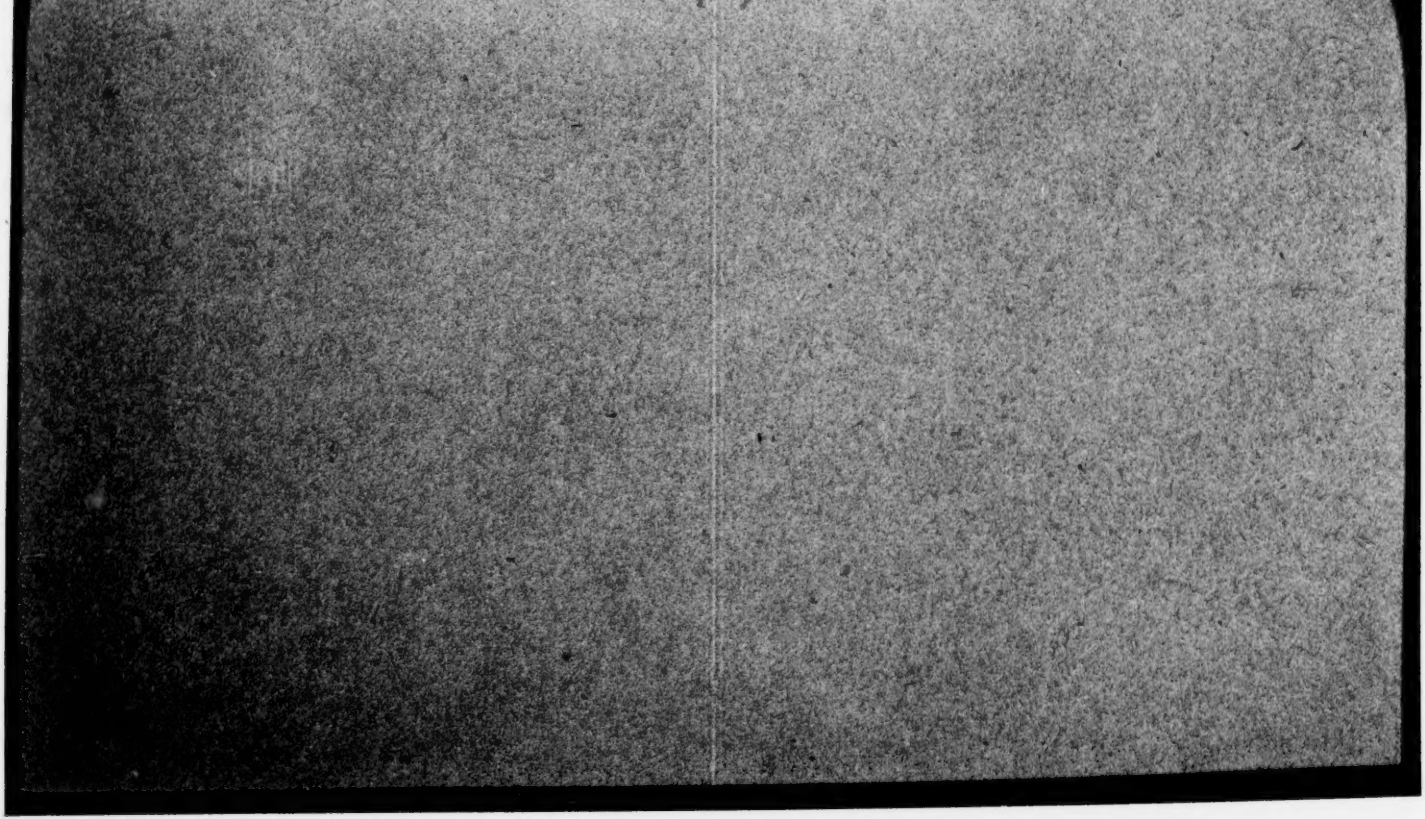
vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED JUNE 6, 1903.

(18,965.)



(18,965.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 314.

FRED RASSMUSSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 18, 1903.

1 In the United States District Court for the District of Alaska, Division No. 1.

THE UNITED STATES OF AMERICA
vs.
FRED RASMUSSEN. } Sec. 127, A. C. C.

At a regular term of the United States district court for the district of Alaska, division No. 1, in the year of our Lord one thousand nine hundred and two, begun and held at Skagway in said district, beginning October 6th, 1902.

The grand jurors of the United States of America, selected, empaneled, sworn and charged within and for the district of Alaska, division No. 1, accuse Fred Rasmussen by this indictment of the crime of keeping a house of ill fame for the purpose of prostitution, fornication, and lewdness, committed as follows:—

The said Fred Rasmussen at or neay Juneau, within the district of Alaska, division No. 1, and within the jurisdiction of this court, on the 4th day of October, in the year or our Lord one thousand nine hundred and two, and on divers other days and at divers other times before and since said day, did keep and maintain a certain house of ill fame for the purpose of prostitution, fornication and lewdness, then and there resorted to for the purpose of prostitution, fornication, and lewdness; and so the grand jurors selected, empaneled, sworn and charged as aforesaid, upon their oaths do say, that Fred Rasmussen did then and there commit the crime of keeping a house of iil fame for the purpose of prostitution, fornication, and lewdness in the manner and form afo-esaid, contrary to the statute in such cases made and provided, and against the peace and dignity of the United States of America.

ROB'T A. FRIEDRICH,
United States District Attorney.

2 [Endorsed:] No. 336 "B." United States of America *vs.* Fred Rasmussen. Indictment for keeping a house of ill fame for the purpose of prostitution fornication and lewdness. A true bill. J. D. Carroll, foreman of grand jury. Witnesses examined before the grand jury L. R. Gillette, W. J. Hills. Filed Oct. 15, 1902. W. J. Hills, clerk. Robert A. Friedrich U. S. district attorney.

3 In the United States District Court for the District of Alaska, Division No. 1.

UNITED STATES
vs.
FRED RASMUSSEN. } No. 336 B. Appearance and Plea.

And now on this day came the U. S. attorney, came also the defendant by his counsel W. E. Crews, and after the reading of the

indictment herein a copy being served in open court, and being asked by the court if he is indicted by his true name and answering that he is; and being asked by the court if he is guilty or not guilty, answers that he is not guilty and therefore puts himself upon the country and the United States attorney for and on behalf of the Government doth the same, and this cause is set down for trial on December 10th, 1902.

M. C. BROWN, *Judge.*

Done in open court this 3d day of December, 1902.

4 THE UNITED STATES OF AMERICA, *District of Alaska.*

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA *vs.* FRED RASMUSSEN. } Verdict. December Term, 1902.

We, the jury empaneled and sworn in the above entitled cause, find the defendant Fred Rasmussen guilty as charged in the indictment herein.

A. M. ROSS, *Foreman.*

Endorsed: No. 336-B. United States of America *vs.* Fred Rasmussen. Indictment for keeping a house of ill fame. Verdict. Filed Dec. 12-1902. W. J. Hills, clerk.

5 In the United States District Court for the District of Alaska, Div. No. 1.

UNITED STATES *vs.* FRED RASMUSSEN. } No. 336 B. Order.

Now on this day this cause came on to be heard upon the motion of defendant for a new trial herein, and after argument by the counsel for the defendant and by the United States attorney, the court being fully advised in the premises denies said motion, to which order and ruling of the court defendant by counsel excepts.

Done in open court this 29th day of December, 1902.

M. C. BROWN, *Judge.*

6 In the United States District Court for the District of Alaska, Div. No. 1.

UNITED STATES *vs.* FRED RASMUSSEN. } No. 336 B. Judgment.

And now on this day came the U. S. attorney Thomas R. Lyons, Esq., came also the defendant in person, came likewise the defendant's attorney W. E. Crews, Esq.; and the defendant having on a former day of this court been by a jury convicted of the crime of keeping a house of ill fame and having been given notice of time of sentence, and now being asked by the court if he has anything to say why the judgment of the court should not now be pronounced against him, and giving no valid or sufficient excuse in that behalf; it is therefore the judgment and sentence of the court that you Fred Rasmussen be taken by the U. S. marshal for division No. 1 of the district of Alaska to the common jail at Sitka, Alaska and that you be there imprisoned in said jail for the term of one year, and that you pay all costs incurred in the prosecution of this cause, and that you stand committed until this sentence is carried into effect.

Done in open court this 26th day of January, 1903.

M. C. BROWN, *Judge.*

7 UNITED STATES OF AMERICA, *First Division, District of Alaska,* } *ss:*

I hereby certify that the within order came into my hands on Feb. 4, 1903, and that I executed the same by apprehending the within named def't Fred Rasmussen at Juneau, Alaska, on said 4" day of Feb. 1903; that I subsequently released said def't on said 4" day of Feb. 1903, upon his depositing the sum of $1500.00 cash in my hands for his appearance until an appeal bond was filed and approved by the court; that afterwards, on Feb. 20, 1903, an order was duly made and entered by the court allowing a writ of error and approving the appeal bond and directing that all proceedings on execution of judgment herein be stayed and suspended pending the determination of said writ of error, and, accordingly, I refunded the cash bail so deposited with me as above set forth, and hereby return this order.

Dated Juneau, Alaska, Feb. 24, 1903.

JAMES M. SHOUP,
U. S. Marshal,
By JOHN B. HEYBURN,
Office Deputy.

Endorsed: 336 B. United States *vs.* Fred Rasmussen. Judgment. Filed Feb. 24, 1903. W. J. Hills, clerk.

8 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336 B. Petition for Writ of Error.

To the Honorable Melville C. Brown, judge of the above entitled court:

The defendant in the above entitled cause, feeling himself aggrieved by the verdict of the jury returned herein on the 12 day of Decembe", 1902, and the judgment and sentence thereon rendered on the 26th day of January, 1903, whereby he was adjudged guilty of the crime charged in the indictment herein and sentenced to serve a term of one year in the common jail at Sitka, comes now and petitions this honorable court for an order allowing defendant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws in such cases made and provided; and also that an order be made staying proceedings and execution in said cause until the further order of the Supreme Court of the United States and pending the prosecution of his said writ of error; and your petitioner will ever pray, etc.

FRED RASSMUSSEN.
W. E. CREWS,
Attorney for Defendant.

9 [Endorsed:] No. 336-B. In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred Rassmussen Copy Petition for writ Filed Apr. 4, 1903 W. J. Hills, clerk by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

10 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336 B.

Know all men by these presents that defendant Fred Rassmussen as principal, and B. M. Behrends, —— —— and —— —— as sureties, *is* held and firmly bound unto the United States of America in the sum of fifteen hundred ($1500) dollars, to be paid to said United States of America; for the payment of which, well and truly to be made, we bind ourselves, our heirs and executors firmly by these presents.

Sealed with our seals and dated this 3d day of March, 1903.

The conditions of the above bond are such, that whereas the above named Fred Rassmussen has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the United States district court for the district of Alaska, division No. 1, wherein the said Rassmussen was adjudged guilty of the crime of keeping and maintaining a bawdy-house for the purpose of fornication and prostitution:

Now, therefore, if the said Rassmussen shall prosecute said writ to affect, and pay all the costs if he shall fail to make good said writ, and shall at all times render himself amenable to the orders and processes of the Supreme Court of the United States, as well as the orders and processes of the United States district court for the
11 district *court for the district* of Alaska, division No. 1, and if said cause be affirmed by the said Supreme Court of the United States, shall render himself in execution of the judgment and abide all orders of the court, this obligation shall be void, otherwise remaining in full force and affect.

B. M. BEHRENDS.
—— ——.
—— ——.

Signed, delivered and taken and acknowledged this — day of March, 1903, before me,

WALTER S. COUTANT,
[SEAL.] *Deputy Clerk of the United States District Court for the District of Alaska, Division No. 1.*

Approved this 3rd day of March, A. D. 1903.
MELVILLE C. BROWN, *Judge.*

12 [Endorsed:] No. 336–B. In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred. Rassmussen Bond on writ Filed Apr. 4, 1903 W. J. Hills, clerk by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

13 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336 B.

Comes now the defendant in the above entitled cause by his attorney, and assigns the following errors as committed by the court in the above entitled and numbered cause, to wit:

1.

The court erred in compelling appellant, over his protest and objection, to be tried with a jury of six men instead of by a jury of twelve men.

2.

The court erred in instructing the jury as follows: That one may commit this offense without being himself present, or even knowing of anyone particular act of this sort occurring in his house, if he knew this sort of thing was going on and knowingly permitted it, though he know of no positive single act, he is guilty of the offense here charged.

3.

The court erred in instructing the jury that before returning a verdict in this cause, that they must be certain beyond a reasonable doubt that the defendant at the time stated in the indictment was the keeper of the place indicated in the indictment. The person who aids in conducting a place of the character named in the indictment as manager, or other controlling character, is a keeper within the allegations of the indictment.

14 4.

The court erred in over-ruling and denying defendant's motion for a new trial.

2.

And for the said errors and other manifest errors of record herein, the defendant prays that said judgment and sentence be reversed and the defendant discharged; and for such other order as the court may deem proper.

FRED RASSMUSSEN,
Defendant.
W. E. CREWS,
Attorney for Defendant.

15 [Endorsed:] No. 336-B. In the United States district court for the district of Alaska, division No. 1. United States *vs.* Fred Rassmussen. Assignment of errors. Filed Apr. 4, 1903 W. J. Hills, clerk, by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

16 In the United States District Court for the District of Alaska, Division No. 1.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336-B.

Now, on this 3d day of April, 1903, within the time allowed by the court, the defendant presents this his bill of exceptions and prays that the same be allowed, signed, sealed and made a part of the record herein; which is accordingly done in chambers, this 3d day of March, 1903.

Bill of Exceptions

Be it remembered that on this 9th day of December, 1902, the above entitled and numbered cause came on regularly for hearing in the above entitled court, the United States appearing by Robert A. Friedrich United States district attorney; and the defendant appearing in person, as well as by W. E. Crews, his attorney. Both parties having announced themselves ready for trial; the following proceedings were had to-wi-

The court then and there announced to the counsel, that the cause would be tried before a jury composed of six jurors, in accordance with the act of Congress as declared by section 171, Carter's Annotated Alaska Code. Counsel then and there objected to a trial by six jurors and demanded a trial by twelve jurors, which objection was by the court overruled. The counsel for the defendant then and there excepted the rulings of the court, which exception was allowed.

Thereupon, the court proceeded to the impaneling of the jury, and after six jurors had been drawn, impaneled and qualified to try the cause, directed that the trial proceed before said jury as impaneled.

Whereupon, the counsel for the defendant renewed his objec-
17 tion to the trial by six jurors, and again demanded that twelve jurors be impaneled to try the cause, which objection was by the court overruled, to which rulings the counsel for the defendant duly excepted, which exception was by the court allowed.

After the case had been closed by both parties, the court thereupon, among other instruction given to the jury, instructed them, as follows:

"I instruct you that a person who knowingly suffers mere lodgers or other inmates of his house to use it as a brothel, keeps in law, however the outward fact may appear, a bawdy-house. One may commit this offense without being themselves present at all or knowing any particular act of this sort occurring in his house. If he knew of this sort of thing going on and knowingly permit it, though he know of positive single act, he is guilty of the offense here charged."

To which instruction of the court, counsel for the defendant duly excepted; and the exception was by the court allowed.

The court further instructed the jury, among other things, that before a jury can return a verdict of "guilty," the jury must be satisfied by the evidence in this case, beyond a reasonable doubt, that the defendant, at the time stated in the indictment, was the keeper of the place indicated in the indictment. A person who aids in conducting a place of the character stated in the indictment as manager or other controlling character, is a keeper within the allegations of the indictment. To the latter of said instructions, counsel for defendant duly excepted, and his exception was duly allowed by the court.

And the jury having returned a verdict on the — January, 1903, finding the defendant guilty as charged in the indictment, the defendant thereafter, and within the time allowed by law,
18 filed his motion for a new trial; which said motion was as follows:

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASMUSSEN. } Motion for New Trial.

Comes now the above named defendant and moves the court to set aside the verdict of "guilty" in the above entitled cause and grant the defendant a new trial therein for the following reasons:

1.

Irregularities in the proceedings of the court by which the defendant was prevented from having a fair trial; and for requiring defendant to go to trial before a jury consisting of six instead of twelve men.

2.

Errors in law occurring at the trial and excepted to by the defendant.

3.

Errors of the court in giving the jury said instructions and refusing to give certain instructions requested by the defendant; all of which was at the time excepted to by the defendant.

W. E. CREWS,
Attorney for Defendant.

Thereafter, on the 29th day of Dec., 1902, said motion came on to be heard, the defendant appearing in court in person as well as by counsel, the Government appearing by the United States attorney, and was duly argued and submitted. The court thereupon overruled the same; to which ruling the counsel for defendant duly excepted. The exception was allowed.

Thereafter, on the 26 day of January, 1903, said defendant was brought into court and the court proceeded to pronounce judgement; that the defendant be confined in the common jail at Sitka for a period of one year.

Now, on this 3d day of April, 1903, within the time allowed by law, the defendant presented this, his bill of exceptions,
19 and prays that the same may be allowed, signed and sealed and made a part of the record herein; which is accordingly done in open court, this 3rd day of March, 1903.

MELVILLE C. BROWN,
Judge of the United States District Court in and for the District of Alaska, Division No. 1.

20 [Endorsed:] No. 336–B. In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred. Rassmussen Copy Bill of exceptions Filed Apr. 4–1903 W. J. Hills, clerk by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

21 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336–B. Order Allowing Writ of Error.

Upon motion of W. E. Crews, attorney for defendant, and upon his filing a petition for writ of error and assignment of errors, together with a bill of exceptions, it is hereby ordered that a writ of error be, and the same is, hereby allowed to have the judgment in this court reviewed by the Supreme Court of the United States; and the defendant having filed in this court a bond in the sum of $1,500.00, which bond has been by this court approved, it is further ordered that all proceedings on execution herein be stayed and suspended pending the determination of the said writ of error in said Supreme Court of the United States.

Dated this 3rd day of April 1903.

MELVILLE C. BROWN,
Judge of the United States District Court
in and for the District of Alaska.

22 [Endorsed:] No. 336–B In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred Rassmussen Order allowing writ Filed Apr. 4, 1903 W. J. Hills, clerk by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

23 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336–B.

The President of the United States of America to the Honorable M. C. Brown, judge of the United States district court in and for the district of Alaska, division No. 1, Greeting:

Because in the proceedings, as also in the rendition of the judgment of a plea, in the said district court, before you, between the United States of America and Fred Rassmussen, manifest error has happened to the great prejudice of the defendant, Rassmussen, as is stated and appears in the petition herein.

We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so as to have the same at said place before said court on the 2d day of June, 1903; that the record and proceedings aforesaid being inspected, said court of appeals may cause further to be done therein to correct those errors what of right and according to law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of April, 1903.

24 Attest my hand and seal of the United States district court in and for the district of Alaska, at the clerk's office at Juneau, Alaska, on the day and year above written.

(COURT SEAL.)

W. J. HILLS,
By W. S. COUTANT,
Deputy Clerk of the United States District Court in and for the District of Alaska, Division No. 1.

Allowed this 3d day of April, 1903.

MELVILLE C. BROWN,
Judge of the United States District Court in and for the District of Alaska.

25 [Endorsed:] No. 336–B. In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred Rassmussen Writ of error Filed Apr. 4, 1903 W. J. Hills, clerk, by W. S. Coutant, deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

26 UNITED STATES OF AMERICA, }
District of Alaska, Division No. 1, } *ss:*

I, W. J. Hills, clerk of the United States district court for the district of Alaska, division No. 1, do hereby certify that the above and foregoing and hereto annexed 25 pages are a full, true and correct transcript of the records and files in the therein mentioned cause of the United States *vs.* Fred Rasmussen, as the same appears of record and on file in my office; and that the same is in accordance with the command of the writ of error in said cause allowed.

That this transcript has been prepared by the plaintiff in error out of court by order of the court, and the costs of examination and certificate, amounting to $2.50, have been paid to me by plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of the court this 20th day of April, A. D. 1903.

[Seal United States District Court, Alaska.]

W. J. HILLS,
Clerk U. S. District Court for Division No. 1, Alaska.

27 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
v.
FRED RASSMUSSEN. } No. 336–B.

The President of the United States of America to the Honorable M. C. Brown, judge of the United States district court in and for the district of Alaska, division No. 1, Greeting:

Because in the proceedings, as also in the rendition of the judgment of a plea, in the said district court, before you, between the United States of America and Fred Rassmussen, manifest error has happened to the great prejudice of the defendant, Rassmussen, as is stated and appears in the petition herein.

We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so as to have the same at said place before said court on the 2d day of June 1903; that the record and proceedings aforesaid being inspected, said court of appeals may cause further to be done therein to correct those errors what of right and according to law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of April, 1903.

28 Attest my hand and seal of the United States district court in and for the district of Alaska, at the clerk's office at Juneau, Alaska, on the day and year above written.

[Seal United States District Court, Alaska.]

W. J. HILLS,
By W. S. COUTANT,
Deputy Clerk of the United States District Court in and for the District of Alaska, Division No. 1.

Allowed this 3rd day of April, 1903.

MELVILLE C. BROWN,
Judge of the United States District Court in and for the District of Alaska.

29 [Endorsed:] No. 336–B. In the United States district court, for the district of Alaska, division No. 1. United States vs. Fred Rassmussen. Writ of error. Filed Apr 4 1903 W. J. Hills, clerk, by W. S. Coutant deputy W. E. Crews, attorney for —— ——, Juneau, Alaska.

30 In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES
vs.
FRED RASSMUSSEN. } Citation in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America and the district attorney for the district of Alaska, division No. 1, Greeting:

You are hereby cited and admonished to be in the Supreme Court of the United States, at Washington, District of Columbia, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States district court for Alaska, division No. 1, at Juneau, wherein Fred Rassmussen is plaintiff in error and The United States are defendants in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of April, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh.

[Seal United States District Court, Alaska.]

MELVILLE C. BROWN,
District Judge for Alaska, Division No. 1.

Attest:
W. J. HILLS, *Clerk,*
By W. S. COUTANT, *Deputy.*

Service of the above and foregoing citation in error is hereby admitted to have been duly and legally made in the district of Alaska this 3rd day of April, 1903.

THOMAS R. LYONS,
U. S. District Attorney.

31 [Endorsed:] No. 336–B. In the United States district court, for the district of Alaska, division No. 1. United States *vs.* Fred. Rassmussen Citation Filed Apr. 8 1903 W. J. Hills, clerk, by W. S. Coutant, deputy W. E. Crews, attorney for ——, Juneau, Alaska.

Endorsed on cover: File No. 18965. Alaska D. C. U. S. Term No. 314. Fred Rassmussen, plaintiff in error, *vs.* The United States. Filed June 6, 1903.

FILE COPY.

Office Supreme Court
FILED
AUG 26 19
JAMES H. McKENNEY

No. 814. 51

IN THE

Supreme Court of the United States,

FRED RASMUSSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,
Attorney for Plaintiff in Error.

R. W. Jennings
Of Counsel.

No. 314.

IN THE

Supreme Court of the United States,

FRED RASMUSSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,

Attorney for Plaintiff in Error.

Section 171, page 179 Carter's Annotated Alaska Codes, in speaking of the formation of juries, among other things, provides as follows:—

"The jury shall consist of 12 persons unless the parties consent to a less number. Such consent shall be entered in the journal: **provided, that hereafter in trials for misdemeanors 6 persons shall constitute a legal jury**

This section was taken verbatim from the Oregon Code, with the proviso added.

Under the authority of the above section of the Alaska Code, the defendant being on trial charged by an indictment

with the commission of a crime was compelled (over his objection, record page 7) to go to trial before a jury of 6 men. And his demand for a constitutional jury of 12 men was denied, and from his conviction, sentence and judgment this writ is prosecuted.

Plaintiff in Error relies chiefly upon his first assignment of error, towit:—

"The court erred in compelling Plaintiff in Error, over his protest and objection, to be tried by a jury of 6 men instead of a jury of 12 men."

The contention is that that portion of the section 171 of Alaska Code authorizing a trial in criminal cases by a jury of 6 persons is void, because it deprives a person, of the right of trial by a jury of 12 competent, impartial men as guaranteed to every citizen by the provisions of the constitution.

We contend that Congress has no power under the constitution to pass an act authorizing a trial in a criminal case by a jury of less than 12 men.

The terms "jury" and "trial by jury" are and always have been well known in the language of the law. They were used at the adoption of the constitution, and always it is believed before that time; and almost since in a single sense.

The jury for the trial of a cause was a body of 12 men described as upright, well qualified and lawful men disinterested and impartial and not of kin, etc., etc.

* * * * * * * * * * *

All the books of the law describe a "trial jury" substan-

tially as we have stated it, and a "trial by jury" is a trial by such a body so constituted and conducted.

So far as our knowledge extends these expressions were used at the adoption of the constitution, and always have been used in these senses alone by all classes of writers and speakers.

The whole current and drift of authority in the United States are, without exception, to the same effect.

We cite but few authorities, although they could be furnished without limit.

Cooley's Constitutional Limitations 391

1 Bishop Crim. Procedure, Sec. 764, 768, 773, 774 779, 781.

Flint River Steamboat Co. vs. Foster, 5 Georgia 195

Stoppe vs. the Commonwealth, 74 Penna. St 458

Wharton's Law Dict., Title "Challenge" U. S. Crim. Law (Lewis) 611.

Worke vs. The State, 2 Ohio St. 277

People vs. Bodine, 1 Denio 304

Freeman vs. The People, 4 Denio 34

Wyheimer vs. The People, 15 N. Y. 424

Cancemei vs. The People, 16 N. Y. 504

People vs. Williams, 6 Calif. 207

Cooley vs. The St. of Texas, 38 Texas 637

Ingersoll vs. Wilson, 2 W. Virginia 59

Thompson vs. the St. of Utah, 107 U. S. 343

St. of Nevada vs. McClare, II Nev. ..... pp. 42—60

The decisions in all the foregoing cases were delivered without a single dissenting opinion; and we have been unable to find a case in America holding a contrary doctrine; and we are satisfied that none can be found.

To further illustrate our views of the law, and to support our contention that Congress is prohibited by the constitution from passing such an act, we beg the indulgence of the court to quote at length from the decision of the Hon. Justice Harlan in a recent case decided in this court, being the case of Thompson vs. The State of Utah, wherein the learned Judge holds as follows:—

"The constitution of the United States provides: 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may have by law directed.' Cons. U. S. art. 3, *2. And by the sixth amendment of the constitution it is declared: 'In **all** criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and **district** wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.'

"That the provisions of the constitution of the United States relating to the right of the trial by jury in suits at common law apply to the territories of the United States is no longer an open question. Webster vs. Reid, II How. 437, 460; Publishing Co. vs. Fisher, 166 U. S. 464, 458, 17 Sup. Ct. Springville City vs. Thomas, 166 U. S. 707, 17 Sup. Ct. 717. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of September 9, 1850 (9 Stat. 453 c. 51, *6), to provide that the unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: 'In our opinion, the seventh amendment secured unanimity in finding a verdict as an essential of feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.'

"It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

"The judgment of this court in Reynolds vs. U. S., 98 U. S. 145, 154,—which was a criminal prosecution in the territory of Utah,—assumed that the sixth amendment applied to criminal prosecutions in that territory.

"In Callan vs. Wilson, 127 U. S. 540, 548, 551, 8 Sup. Ct. 1301, which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the constitution as well as by the fifth and sixth amendments. The contention of the govern

ment was that the constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state "the trial shall be at such place or places as the Congress may by law have directed," had probably, reference only to offences committed on the high seas; that in adopting the sixth amendment the people of the states were solicitous about trial by jury in the states, and no where else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be hereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock yards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the constitution as related to the trial of crimes by jury. That contention was overruled, this Court saying: 'As the guarantee of a trial by jury, in the third article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundmental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution or of the original amendments to justify the assertion

that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty and property; especially of the privilege of trial by jury in criminal cases.' 'We cannot think,' the court further said, 'that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.'

"In Late Corporation of the Church of Jesus Christ of the Latter day Saints vs.U.S.136. US.I, 44,10 Sup.Ct.792,one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which--National Bank vs. County of Yankton, 101 U. S. 129, 133—it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it "may do for the territories what the people, under the constitution of the United States, may do for the states." Reference was also made to Murphy vs. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. 747, in which it was said: 'The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restric-

tions as are expressed in the constitution, or are necessarily implied in its terms.' The opinion of the court in Late Corporation of the Church of Jesus of Latter-day Saints vs. U. S. then proceeded: 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial legislature established therein is generally expressly reserved in the organic acts establishing government in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved Sept. 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. * * * * All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454.

"Assuming, then, that the provisions of the constitution relating to trial for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161; I Chit. Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta de-

clared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by 12 persons. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power' 2 Story, Const. *1779. In Bac. Abr. title "juries," it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellences of our constitution; for what greater security can any person have in his life, liberty or estate than to be sure of not being divested of nor injured in any of these without the sense and verdict of 12 honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of 12 men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word "jury" and the words "trial by jury," were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation —the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Such is the condition in Alaska.

"Was it, then, competent for the State of Utah, upon its admission into the Union, to do, in respect of Thompson's crime, what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons?

"We are of the opinion that the state did not acquire, upon its admission into the Union, the power to provide, in respect of felonies committed within its limits while it was a territory, that they should be tried otherwise than by a jury such as is provided by the constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the state not only to do what the United States, in respect of Thompson's crime, could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed."

It cannot be said that such an act can be sustained on the theory that it is a police regulation; for, as such, it would be equally obnoxious. The only theory upon which such legislation by Town Councils and other inferior and limited tribunals, have been sustained is that, upon an appeal from such tribunals, the defendant would be entitled to a trial by a constitutional jury. Such contention would not meet the situation in Alaska.

That the citizens of Alaska are guaranteed the constitutional right of a trial by jury certainly cannot be questioned. We are under the direct and complete jurisdiction of the United States. Our courts are clothed with the power and jurisdiction of Circuit and District Courts of the United States.

SEC. 367, PAGE 432 OF OUR CODE provides that so much of the common law as is applicable and not inconsistent with the Constitution of the United States, or with any law passed by Congress, is adopted and declared to be law within the District of Alaska.

ARTICLE 3 OF THE TREATY OF CESSION between the United States and Russia provides that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

To say that the citizens of Alaska do not enjoy the constitutional guarantees, but are left to the arbitrary will of a legislative body composed of members in the choice of which they have no voice, to be dealt with according to that

miserable, lame and imperfect compilation of laws 'know as the "Carter's Annotated Alaska Codes" would be to increase the absurdity of the position of our general government towards its dependencies to an intolerable degree.

As to our third assignment or error, and the only other assignment of error that we shall consider:

It seems to us that a simple statement of the proposition fully and sufficiently reveals the error of the trial court.

Section 127 of the Alaska Codes (being the section for the violation of which the defendant was on trial) provides "that if any person shall keep and set up a house of ill fame, etc., * * * * * shall be punished, etc., * * * * * * *"

It is very clear from the reading of the section that the only person that can be guilty of this offense is the person who sets up the place; and that the employes and help about the place could not be charged with the offense. And yet the Court in its instructions to the jury practically instructed them "that all persons who aided, or was in any way connected, or had anything to do with such place could be found guilty under the indictment of setting up and keeping."

Such instruction, we contend, was clearly erroneous; and did, in fact, injuriously affect the defendant on trial. As it was clearly shown that he was not the licensee, but was only an employee of the house, we respectfully submit that this cause should be reversed, and the new trial be granted.

W. E. CREWS,

Attorney for Plaintiff in Error.

A. W. Gunning.

Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FRED RASMUSSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

December 12, 1902, Fred Rasmussen was found guilty of charges made in an indictment for violating section 127 of the Alaska Code (30 Stats. at Large, 1272), which provides:

> SEC. 127. That if any person shall keep or set up a house of ill fame, brothel, or bawdy-house for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than one hundred nor more than five hundred dollars.

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In accordance with section 171 of the Alaska Code (31 Stats. at Large, 358), the jury consisted of six men.

Plaintiff in error assigns the following errors in bringing this appeal:

1. The court erred in compelling appellant, over his protest and objection, to be tried with a jury of six men instead of by a jury of twelve men.

2. The court erred in instructing the jury as follows: That one may commit this offense without being himself present, or even knowing of any one particular act of this sort occurring in his house, if he knew this sort of thing was going on and knowingly permitted it, though he knew of no positive single act, he is guilty of the offense here charged.

3. The court erred in instructing the jury that before returning a verdict in this cause, that they must be certain beyond a reasonable doubt that the defendant, at the time stated in the indictment, was the keeper of the place indicated in the indictment. The person who aids in conducting a place of the character named in the indictment as manager, or other controlling character, is a keeper within the allegations of the indictment.

ARGUMENT.

Plaintiff in error in his brief says he relies chiefly upon his first assignment of error, which raises the question whether Congress has the power to provide for trials for misdemeanors by juries of less than twelve persons.

Whether or not Rasmussen shall be punished for the offense for which he was convicted, which is of great

importance to the people of Alaska, is nevertheless of small consequence compared with the broader question involved in the adjudication of this case.

The Government contends that all the provisions of the Constitution were not extended to Alaska by article 3 of the treaty of session, by section 1891 of the Revised Statutes, or by any subsequent legislation. The Government expects to establish the proposition that Alaska is not an organized Territory within the meaning of section 1891, as that section is understood by Congress, and as it has been construed, by implication at least, by this court; and that, therefore, Congress in legislating for the Territory is restricted only by such provisions and limitations of the Constitution as are applicable and fundamental.

Plaintiff in error relies solely upon *Thompson* v. *State of Utah* (170 U. S., 343), and cases cited therein, to sustain his contention that section 171 of the Alaska Code, providing "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," is in violation of section 2, article 3, of the Constitution of the United States and of the sixth amendment of the Constitution. That case involved a point very different from that here contended for. The following language of the court in that case shows the principal point decided:

> * * * the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed

within the limits of the State while it was a Territory without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any State of an *ex post facto law*.

* * * * *

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?

* * * * *

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because in respect of such crimes the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury. (Pp. 346, 350, 355.)

Section 17 of the act establishing a Territorial government for Utah (9 Stat. L., p. 458) provides, "That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." No such extension of the Constitution has been made to Alaska. The

remarks of the court quoted on pages 5 and 10 of plaintiff's brief were therefore made in a case not analogous to the one now before the court. (*Am. Pub. Co.* v. *Fisher*, 166 U. S., 467.)

The cases of *Hawaii* v. *Mankichi* (190 U. S., 197) and *Dorr & O'Brien* v. *United States* (May 31, 1904) are directly in point with the question now presented. They are decisive that it is not unconstitutional for Congress to pass an act authorizing a trial in a criminal case by a jury of less than twelve men, for Territories, under certain conditions. In the former case Congress expressly affirmed conviction by nine jurymen, when it said: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine," and impliedly affirmed conviction without trial by jury in the Philippine Islands. Mankichi brought petition for *habeas corpus*, on the ground that a conviction by nine of twelve jurors in an Hawaiian court was in violation of articles 5 and 6, amendments of the Constitution. The court in arriving at the conclusion that said sections of the Constitution did not apply, said:

> If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly

> requires, amendment 5, that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" and, amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body?
>
> * * * * * * * But we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being (pp. 212, 218).

In their concurring opinion Justices White and McKenna say:

> The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them (p. 220).

In the Dorr and O'Brien case the court said:

> This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine

Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands.

* * * * *

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

* * * * *

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress in framing laws for outlying territory belonging to the United States was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a

> method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept in advance of incorporation into the United States a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the Territories, to hamper its exercise with this condition.
>
> We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, paragraph 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

The status of Alaska is not materially different from that of the Philippine Islands and Hawaii at the time the question in the Mankichi case arose. The facts in this case are much more favorable to the conclusion that the sections of the Constitution do not apply than they were in the latter case. Neither the treaty nor subsequent laws of Congress have "incorporated Alaska into the United States." Much stronger expressions than those quoted on page 11 of brief of plaintiff in error, taken from the Alaskan Code, and article 3 of

the treaty of cession, were used in the Newlands resolution.

Article 3 of the treaty of cession with Russia provided:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country. (15 Stats., 542.)

This article was intended to extend, and no doubt did extend, to the civilized inhabitants of the Territory certain fundamental attributes and privileges of American citizenship, but it will hardly be contended that it was thereby intended to extend all the provisions of the Constitution to this barren and desolate region, peopled as it was by savages and an alien race, wholly out of sympathy with our customs and institutions.

Mr. Justice Brown in the case of *Downes* v. *Bidwell* (182 U. S., 280) referred to the provisions in article 3 of this treaty of cession in these significant words:

> In all its treaties hitherto the treaty-making power has made special provision for this subject; * * * in the case of Alaska, that the inhabitants who remained three years, "with

> the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc. * * * In all of these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

In the *Dorr & O'Brien case* (*supra*) this court held that the right of trial by jury is not a fundamental right. This ruling makes it clear that there is nothing in the third article of the treaty of cession which in any way militates against the contentions of the Government in this case

The next year after Alaska was acquired, Congress provided for the nationalization of all vessels owned by residents of the Territory and also extended the customs laws to the Territory. No further legislation affecting the Territory was enacted, except some minor legislation regulating the killing of fur seals, until 1884, when an act was passed "providing a civil government for Alaska." In that act (23 Stats., 24) Congress provided that "the territory ceded to the United States by Russia by the treaty of March 30,1867, and known as Alaska, shall constitute a civil and judicial district," etc. In all other acts which I have examined organizing Territories they have been referred to as *Territories* and not as *districts.*

In section 2 of this act a governor is provided for, and it is provided further that "he shall perform generally in and over said district such acts as pertain to the office of governor of a Territory, so far as the same may be made or become applicable thereto. He

shall make an annual report * * * of the condition of the said district," etc.

Section 9 *inter alia* provides, "That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law; and the laws of the United States not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto; but there shall be no legislative assembly in said district, nor shall any delegate be sent to Congress therefrom."

Section 14 *inter alia* "That the provisions of chapter 3, title 23 of the Revised Statutes of the United States relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specially otherwise provided."

In the criminal code for Alaska passed March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District" (30 Stats., 1253), Congress was careful to preserve the distinction theretofore made and to refer to Alaska as a district and not as a territory.

On June 6, 1900, an act was passed "Making further provision for a civil government for Alaska, and for other purposes." (31 Stats., 321.) Congress, however, was careful to provide in section 1 of title 1, "That the territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a civil and judicial district."

Plaintiff in error at page 12 of his brief refers to section 367 of title 3 of this act, which is found at page 552, 31 Stats., and is as follows:

> SEC. 367. So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the district of Alaska.

It is needless to discuss the provisions of this section, since section 171 of title 1 of the same code (p. 358) provides for trials of misdemeanors by a jury of six, which right was expressly reserved by the section just quoted.

Section 1891 of the Revised Statutes provides:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Now, what is an organized territory as understood by Congress and as defined by this court? The Standard Dictionary, volume 2, page 1861, defines a Territory as—

> A division of the national domain of the United States that, by act of Congress, has been organized under a separate government in the expectation that it, or some part thereof, will ultimately be admitted into the Union as a State; as, Arizona is a Territory.
>
> An organized Territory has a government

> similar in many respects to that of a State, but its political entity is wholly under the authority of the Federal Government.

The Century Dictionary and Encyclopædia, volume 8, page 6248, says that a Territory is—

> In the United States an organized division of the country not admitted to the complete rights of statehood. Its government is conducted by a governor, judges, and other officers appointed from Washington, aided by a *Territorial legislature*. Each Territory sends one Delegate to Congress, who has a voice on Territorial matters, but can not vote. * * * There are now (1898) three organized Territories, New Mexico, Arizona, and Oklahoma, and there are also two unorganized Territories, the Indian Territory and Alaska.

A critical examination of chapter 1, title 23 of the Revised Statutes, covering the Territories, and including section 1891, shows that Congress has considered a legislative assembly and a delegate necessary to complete organization within the meaning of that section. Section 1846 provides *inter alia* that "legislative power in each Territory shall be vested in the governor and a legislative assembly." Here Congress did not mean each Territory whether organized or unorganized, but that each organized Territory should have a legislative assembly. Section 1851 provides that "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. * * *"

Section 1862 provides *inter alia* "That every Territory shall have the right to send a Delegate to the House of Representatives of the United States to serve during each Congress who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof." Congress did not here mean that every Territory whether organized or not should be entitled to a delegate, but that every organized Territory should be entitled to a delegate. This section shows clearly that Congress regarded the right of representation in Congress as essential to all organized Territories, for in the following section (1863) providing for the time, places, and manner of holding elections for delegates, it is provided, "that at all subsequent elections therein, as well as at all elections for a Delegate in *organized Territories*, such time, places, and manner of holding the election shall be prescribed by the law of each Territory." Section 1885 provides that "The legislative assembly of every Territory hereafter organized shall hold its first session," etc.

It is clear, then, that Congress in this chapter regarded all Territories not having an autonomous local government as unorganized within the meaning of section 1891, extending the Constitution and all laws of the United States which are not locally inapplicable to all the organized Territories and Territories thereafter to be organized.

This view is much strengthened when we remember that in the first act providing a civil government for

Alaska Congress was careful, as heretofore pointed out, to provide that Alaska should not have a legislative assembly and should not be entitled to a Delegate in Congress.

In 1886 Congress passed "An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes" (24 Stats., 170), the first section of which provided "That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases," etc.

Section 2 provided "That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company," etc.

Section 4 provided "That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted," as therein stated.

It is evident that Congress in this act was simply amplifying the provisions of chapter 1, title 23, of the Revised Statutes, and that a local government was still considered essential to the organization contemplated by section 1891.

Whether or not Alaska was completely organized within the purview of section 1891 was not in issue and was not touched upon by this court in either the *Coquitlam case* (163 U. S., 346) or in the *Binns case*

(194 U. S., 486). It was not necessary that it should be a completely organized Territory to be included in the act of 1891, referred to in the Coquitlam case. The question was whether or not it was a Territory as the word is used in that act, and the court held it was. In effect the *Binns case* holds that Congress may provide for the collection of certain license taxes in a given Territory if the purpose of such taxes is to provide revenue for the enforcement of the laws enacted for such Territory; that is, if the benefit is to inure to the Territory. That Alaska is a partially organized Territory for which certain special legislation has been enacted by Congress, can not be denied; but it is nevertheless earnestly contended that there is still lacking the most important attributes of complete organization, the organization contemplated by Congress in enacting section 1891, viz, local self-government through the medium of a Territorial legislature and the right of representation in Congress through a Territorial Delegate elected by the people of the Territory.

Moreover this court, in the case of *In re Lane* (135 U. S., 443), adopted the understanding of Congress as to what constituted an organized Territory. In that case Lane had been prosecuted in the district of Kansas for an offense committed in that part of the Indian Territory then known as Oklahoma. Petition for a writ of habeas corpus was prayed out on the ground, among others, that the trial court had no jurisdiction, because the offense was committed in a Territory of the

United States. The statute under which he was tried (25 Stat., 658) provided that whoever committed the offense denounced—

> * * * in the District of Columbia or other place except the Territories, over which the United States has exclusive jurisdiction; or on any vessel within the admiralty or maritime jurisdiction of the United States, and out of the jurisdiction of any State or Territory, shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years, and for each subsequent offense not more than thirty years.

This court discharged the rule. Mr. Justice Miller, in the opinion, said:

> * * * But we think the words "except the Territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower House of that body, except what are called Delegates, with limited functions. Yet they exercise nearly

> all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them. It is this class of governments, long known by the name of Territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.
>
> Oklahoma was not of this class of Territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits, as the Territories of the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound (pp. 447, 448).

Similar offenses committed in Alaska would then have been prosecuted under the provisions of this law, notwithstanding that the act of May 17, 1884, "providing a civil government for Alaska" was in force. Congress has been very careful not to change the status of Alaska since that time. It has never had any local government, and Congress is still the only law-making body for the Territory. The governor is simply the agent of Congress.

Section 1891 must be construed with reference to the other provisions in that chapter, for, as said by Mr. Justice Brown in the *Mankichi case* (190 U. S., 212), "there is another question underlying this and all other rules for the interpretation of statutes, and that is what was the intention of the legislative body." Con-

gress has made it very plain that it has never considered Alaska within the provisions of section 1891.

There is far greater reason for withholding the provisions of the Constitution from what is practically a great mining camp, peopled by a heterogeneous and migratory class from whom all power of local government has been, with good reason, withheld by Congress, than there is in withholding the Constitution from a Territory that has advanced to that stage where Congress may with safety extend the privileges of self-government. Where local self-government has been extended the Territory is to all intents and purposes, as was said by Freeman in his American Lectures (p. 351), "an infant State." All its domestic and municipal concerns are controlled by its own legislative body. All questions of local taxation are passed upon and settled by that body. There would be very cogent reasons why Congress, having completely organized a Territory and having delegated legislative powers thereto, would want the Constitution extended as the chart and compass by which the local legislature would be guided. In fact that is precisely what Congress has done in every instance where it has completely organized a Territory.

Plaintiff in error has abandoned his second assignment of error, and thereby eliminated it from further consideration.

An ingenious arrangement of statements regarding the court's charge to the jury, erroneous conclusions regarding the charge, and incorrect quotation of the law characterize the third assignment of error.

The law provides:

> That if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine of not less than $100 nor more than $500. (30 Stats. at Large, 1272.)

According to the version of plaintiff in error, a person must both "keep and set up" a house of ill fame to be guilty of this offense. According to the statute, however, it is not necessary that a person "set up" such a house, but if he "keeps" it, he is guilty of this offense and the indictment so charges.

The quotation on page 12 of the brief of the plaintiff in error, purporting to be taken from the charge of the judge, is not found in the copy of the charge certified by the clerk of the United States district court, filed with the clerk of this court, a copy of which is set forth in an appendix to this brief. Neither is the substance of that quotation or of the third assignment of error found in the charge. But the contrary thereof is clearly stated in the last two paragraphs of the charge. A discussion of the charge as alleged by the plaintiff in error is deemed unnecessary.

Respectfully submitted.

CHARLES H. ROBB,
Assistant Attorney-General.

APPENDIX.

United States v. Fred Rasmussen.

GENTLEMEN OF THE JURY:

The section under which this indictment is brought by the grand jury reads as follows:

> That if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine of not less than one hundred nor more than five hundred dollars.

The following section provides—

> That in all prosecutions for the crime defined in the section last preceding, common fame shall be competent evidence in support of the indictment.

A bawdyhouse and a house of ill fame are synonymous terms, meaning one and the same thing. A bawdyhouse is any place, whether of habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes.

A house of ill fame is another name for the same thing.

The offense, therefore, that is charged here is not committing the offense of bawdy or illicit commerce between the sexes, but of keeping a house where this

sort of thing is permitted and carried on. The keeper may be a man or woman, and a married woman may be indicted for the offense, either alone or with her husband.

Keeping the house [does] not necessarily import property, but may signify that share of government which the wife has in the family as well as the husband. Although a statute has authorized the wife to own property and carry on business separately from her husband, and though she keep a bawdyhouse as her own venture and for her separate profit, if the husband knowing this lives with her and does not by his marital power restrain her, he is indictable also as the keeper.

The gist of this offense appears to consist in the allurement which the place holds out to a miscellaneous and common bawdry, corrupting to the public morals. The offense is not committed by permitting in a house a single illicit act, or by being a woman, even a prostitute, living in a bawdyhouse, or by a loose woman simply dwelling alone and having her daughters with her.

A bawdyhouse may consist of no more than a single room in a dwelling house, or it may be a tent, or a boat on a river; not even need the place be used for a dwelling or place of habitation.

Our statute provides that the offense of keeping a bawdyhouse is shown by proving its general or common reputation, together with other evidence. And why is this true? It is a place that is known to be open to all comers, of all sorts of characters, for illicit intercourse between the sexes. It is this general reputation which allures people to the place. It is its public notoriety that largely makes it an offense against decency and public morals.

Gentlemen, you have heard all the testimony in this case. You have heard the statements of witnesses as to this place being a bawdyhouse. From what I have already stated, you will understand that a place may be a saloon; it may be a dance house; it may be a theater; it may be a place where cigars and liquors are sold, and it may be at the same time a bawdyhouse.

A person who leases and lets rooms in a place for purposes of this character, knowing what is going on in the house, is the keeper of a bawdyhouse. If he lets a single room in his house for illicit purposes of this kind, he is the keeper of a bawdyhouse for all the purposes of this prostitution [prosecution]. The fact that he leases rooms to people in no wise lessens his offense, although they conduct their rooms to please themselves. The law is that if he leases and lets them, knowing that they are used for the purposes prohibited by the statute, he is as much the keeper of a bawdyhouse as though he has personal control of each and every person in it.

A person who knowingly suffers mere lodgers or other inmates of his house to use it as a brothel, keeps, in law, however the outward facts may appear, a bawdyhouse.

One may commit this offense without being themselves present at all, or even knowing of the fact of any one particular act of this sort occurring in his house. If he knows that if this sort of thing is going on, and knowingly permits it, though he know of no positive single act, he is guilty of the offense here charged.

I believe I have stated to you already that it is not one act of this kind committed in a house that constitutes it a bawdyhouse. Persons may go into a

hotel, rent their room, and commit this act without the knowledge or even thought of their being there for that purpose. Even if several people should do this at different times, it might not constitute the place a bawdyhouse; but if people go there, and the proprietor knows that they are there for that purpose, and he knows their reputation in the community where he lives, and the purposes for which they come together, and he permits them to live in his rooms for that purpose, he is the keeper of a bawdyhouse. If he continues to let even a single room in his house for these purposes and knows of their going on in his house, he is in law the keeper of a bawdyhouse. Proof of the offense charged in the indictment as to the character of the place may be made by showing the common repute of the place as a bawdyhouse or house of ill fame, together with proof of the gathering there habitually of persons of ill repute and evil fame for prostitution. When men and women indulge in lewd conduct, obscene language, profane language, and the like, and engage in dancing, drinking, and sending drinks to upper story, and like conduct, if you are not satisfied from this character of proof beyond a reasonable doubt that the place named in the indictment was a place of prostitution, and you are further satisfied from the evidence beyond a reasonable doubt that the defendant was the keeper of such place as explained in these instructions, you should find the defendant guilty as charged in the indictment.

You are further instructed that if you find the house or place described in the indictment was a bawdyhouse or house of ill fame, and was kept by the defendant, then you may infer, and the law infers, that it was kept and set up for the purposes of prostitution.

It has been testified that Mr. Kyrage holds the license for this place. You will remember his testimony upon the proposition of his connection with the place; that he had no interest in its management; that he simply was there for the purpose of selling beer. Whatever his testimony is on these matters, you will remember it. It is sufficient for me to say that he is not on trial for this offense. You are here to try the defendant upon the crime charged in the indictment as every other offense is tried, from all the testimony in this case, as given here in court.

But a man must not close his eyes. He must not close his mind from the knowledge that is common to all humanity. When a man says to you he is a keeper of a dance house, what does he mean? If a man testified to you that people in a dance house indulge in lascivious conduct toward each other, what do you understand that to mean? And when he further testifies that these people who are dancing together separate, and the women go upstairs and the men shortly follow them, what, from your knowledge of the world and the experience and judgment of men generally, is their purpose? From the facts stated you are to determine what is meant, and not take the naked wordst hemselves. You are to understand all the words imply, as in other affairs.

This defendant, like any other, should not be convicted of the offense charged unless he is found to be guilty by evidence that convinces your mind beyond a reasonable doubt. There should be no halfway measures about it. If he is not guilty under the evidence before you and the law as I give it, say so by your verdict. If he is guilty, you should so find.

And this defendant must not be convicted on the weight or preponderance of the evidence as in civil

cases. Every reasonable doubt as to the guilt of the accused must be removed from your mind before you can find him guilty. But you are not permitted to go to your jury room and raise imaginary doubts as to the guilt of the accused. Reasonable doubt does not mean any sort of doubt; but you are to think about the testimony in the case as honest, earnest men desiring to do your duty, and to act as you would in passing upon the graver affairs of life. The doubt, in order to be resolved in favor of the defendant, must be reasonable. Absolute certainty in the proof of crime is rarely attainable and never required.

Let me say to you further that every man accused of the commission of a crime is entitled to the presumption of innocence, which presumption is to go with him throughout the trial of the case, and control in your considerations, until it is overcome by evidence that convinces you of the guilt of the accused beyond a reasonable doubt.

You are the judges of the credibility of witnesses and the weight to be given to the testimony of each and all of them. You are to recall the testimony that has been given on the stand for yourselves. You are not to take statements as to the evidence that has been given from either court or counsel. If I state anything as to evidence that has been given it is for the purpose of aiding you in your understanding of the law of the case, and not for the purpose of giving my view of the evidence; neither are you to consider statements of counsel as conclusive as to the evidence that has been given. Recall for yourselves the evidence as given to you from the witness stand, and the law as I have given it to you, and let that alone control you in the verdict you render in every case.

The jury are instructed that, before you will be

justified in finding a verdict of guilty against the defendant, you must be satisfied by the evidence in the case, beyond a reasonable doubt, that the defendant, Fred Rasmussen, was the keeper of a bawdyhouse, in manner and form as charged in the information; and it is incumbent to establish that fact, by affirmative proof, beyond a reasonable doubt.

I instruct that under the law "common report" is competent evidence for you to consider in connection with the other evidence in the case as to the kind of a house—is the one in question—but as to whether the defendant was the actual keeper of said house can not be proven by reputation. You must be satisfied by other proofs, beyond a reasonable doubt, that he was the keeper before you can find him guilty.

General reputation is competent as bearing upon its character, yet there must be some testimony of its actual use as a house of ill fame.

You are instructed that by the term "keeper" as used in this connection is meant the person in charge and control of the house in question, and having the management of such, as distinguished from the other inmates thereof.

You are further instructed that although you should find from the evidence in this case that the defendant, Fred Rasmussen, was an inmate of the house in question, and although you should find that said house was a house of prostitution, unless you further find from the evidence, beyond a reasonable doubt, that he was the keeper of the same your verdict should be "Not guilty."

(Endorsed:) 336–B. In U. S. dist. court, United States *vs.* Fred Rasmussen. Instructions to jury filed Dec. 12, 1902. W. J. Hills, clerk. U. S. atty. Atty. for ptff.

UNITED STATES OF AMERICA,

District of Alaska, Division No. 1, ss:

I, W. J. Hills, clerk of the United States district court for the district of Alaska, Division No. 1, do hereby certify that the above and foregoing six typewritten pages constitute a full, true, and correct copy of all the instructions and the entire charge to the jury in cause No. 336–B, United States *v.* Fred Rasmussen, as the same appear on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of this court on this the 2d day of July, 1904.

[SEAL.]

W. J. HILLS,

Clerk U. S. District Court for Div. No. 1, Alaska.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FRED RASMUSSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

SUPPLEMENTAL STATEMENT FOR THE UNITED STATES.

The status of Alaska is alluded to in the cases of *Steamer Coquitlam* v. *United States* (163 U. S., 350) and *Binns* v. *United States* (194 U. S., 486). In the former case the court decided Alaska was included in the fifteenth section of the law of March 3, 1891, providing:

> That the circuit court of appeal in cases in which the judgment of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court to be made from time to time, be assigned to particular circuits.

Mr. Justice Harlan said (p. 352):

> But we are of the opinion that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the act of 1891 upon the circuit court of appeals to review the judgments of the supreme court of any Territory assigned to such circuit by this court. That act was necessarily so interpreted by this court when, by its order of May 11, 1891 (139 U. S., 707), Alaska was assigned to the ninth circuit. Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. * * * Looking at the whole scope of the act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective Territories among the existing circuits.

In the Binns case the issue is thus stated by the court (p. 494):

> Congress has undoubtedly the power by direct legislation to impose these license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the Territory and disbursed by him solely for the needs of the Territory. Does the fact that they are ordered to be paid into the Treasury of the United States and not specifically appropriated to the expenses of the Territory, when

> the sum total of these and all other revenues from the Territory does not equal the cost and expense of maintaining its government make them unconstitutional? In other words, if, under any circumstances, Congress has the power to levy and collect these taxes for the expenses of the Territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the Territory?

In his preliminary remarks Mr. Justice Brewer said (pp. 490–491):

> It had been theretofore held by this court in *Steamer Coquitlam* v. *United States* (163 U. S., 346, 352) that "Alaska is one of the Territories of the United States. It was so designated in that order (the order assigning the Territory to the ninth judicial circuit) and has always been so regarded And the court established by the act of 1884 is the court of last resort within the limits of that Territory." Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884 (23 Stat., 24), entitled "An act providing a civil government for Alaska" provided: That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided.

In neither of these cases was the status of Alaska as regards its being an organized or unorganized Territory involved. That Alaska is a Territory is undisputed, but the Government in this case contends it is not an *organized* Territory within the meaning of section 1891, Revised Statutes. It was not necessary that Alaska should be a completely organized Territory to be included in the act of 1891 referred to in the *Coquitlam* case. As seen by the first quotation cited above the court did not regard it as necessary. The question was whether or not it was a Territory as the word is used in that act and the court held it was. Whether or not it is a completely organized Territory the court did not there consider material. In the *Binns* case the Government expressly excluded from consideration the question of Alaska's status, for in the brief of the Assistant Attorney-General he says:

> It is unnecessary to ascertain or attempt to define the precise political relations existing between the Territory of Alaska and the Federal Government. That Alaska is territory belonging to the United States is settled beyond controversy, and that Congress has plenary powers, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition.

The Government conceded for the purposes of that case that Alaska might be regarded as an organized or unorganized Territory; neither does that question form any part of the issue in that case.

It is respectfully submitted whether it would not be an injustice to allow these references to prevent full and careful consideration in this case, where the issue of Alaska's status is vital. And though the court may regard Alaska as an organized Territory, speaking generally or in connection with the statutes involved in those cases, it may very properly be held not to be an organized Territory within the meaning of section 1891, Revised Statutes.

In the case *In re Lane*, referred to in the brief of the United States, the court interpreted the words "except in Territories," used in the law there involved, as meaning organized Territories, and the question whether or not Oklahoma was an organized Territory then became a direct issue in the case. The court defined an organized Territory as set forth on page 10 of the brief.

It is respectfully submitted the language of the court in the *Lane* case and the arguments in the brief for the United States, especially the fact that Alaska is still by express language deprived of a legislature and a Delegate to Congress—the two most important elements of an organized Territory, as shown by Title XXIII of the Revised Statutes—indicate clearly that Alaska is not regarded by Congress as an organized Territory over which the Constitution is extended.

CHAS. H. ROBB,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 51.—October Term, 1904.

Fred Rassmussen, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Alaska.

[April 10, 1905]

Mr. Justice White delivered the opinion of the Court.

The plaintiff in error was indicted for violating section 127 of the Alaska Code, prohibiting the keeping of a disreputable house and punishing the offence by a fine or imprisonment in the county jail.

As stated in the bill of exceptions, when the case was called the court announced "that the cause would be tried before a jury composed of six jurors," in accordance with section 171 of the Code for Alaska adopted by Congress, wherein, among other things, it was provided as follows (31 Stat. 358): "That hereafter in trials for misdemeanors six persons shall constitute a legal jury." To this announcement by the court an exception was duly preserved. A jury of six persons was then empannelled, when the objection was renewed and a demand made for a common law jury, which was refused, and an exception was again taken.

To a verdict and judgment of conviction this writ is prosecuted directly to this court, reliance for a reversal being had on the violation of the Constitution alleged to have resulted from the trial of the case by a jury of six persons and upon other errors of law which, it is asserted, the court committed in the course of the trial.

At the threshold of the case lies the constitutional question whether Congress had power to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, that is to say, whether the provision of the act of Congress in question was repugnant to the Sixth Amendment to the Constitution of the United States.

At the bar the Government did not deny that offences of the character of the one here prosecuted could only be tried by a common law jury, if the Sixth Amendment governed. The Government moreover, did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is therefore sought to be sustained upon the proposition that the Sixth Amendment to the Constitution did not apply to Congress in

legislating for Alaska. And this rests upon two contentions which we proceed separately to consider.

1st. *Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska.*

If the premise, that is, the status of Alaska, be conceded, the conclusion deduced from it is established by the previous rulings of this court. In *Dorr* v. *United States*, (195 U. S. 138,) the question was whether the Sixth Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in *Downes* v. *Bidwell*, (182 U. S. 144,) to think that the uniformity clause of the Constitution was inapplicable to Porto Rico, and following the ruling announced in *Hawaii* v. *Mankichi*, (190 U. S. 197,) it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation. The power to acquire territory without incorporating it into the United States as an integral part thereof, as we have said, was sustained upon the reasoning expounded in the opinion of three, if not of four, of the judges who concurred in the judgment in *Downes* v. *Bidwell*, that reasoning being in effect adopted in the Dorr case as the basis of the ruling there made, the court saying (p. 143):

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (*Downes* v. *Bidwell*) that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."

And in view of the status of the Philippine Islands it was decided that the Sixth Amendment was not applicable to those islands, and therefore Congress, when it legislated concerning them, was not controlled by the provisions of that amendment. It would serve no useful purpose to re-express the reasons supporting this conclusion, and we content ourselves with quoting the summing up made by the court in the opinion in the Dorr case, as follows (p, 149:)

"We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to what other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

We are brought then to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency.

Concerning the test to be applied to determine whether in a particular case acquired territory has been incorporated into and forms a part of the United States, we do not deem it necessary to review the general subject, again contenting ourselves by quoting a brief passage from the opinion in *Dorr* v. *United States*, summing up the reasons which controlled in determining that the Philippine Islands were not incorporated, viz., (p. 143):

"If the treaty-making power could incorporate territory into the United States without Congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

"The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, (32 Stat. 691,) there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands."

This brings us to consider the treaty by which Alaska was acquired and the action of Congress concerning that acquisition, for the purpose of ascertaining whether within the criteria referred to in *Downes* v. *Bidwell* and adopted and applied in *Dorr* v. *United States*, Alaska was incorporated into the United States.

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared, in article 3, that:

"The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in *Downes* v. *Bidwell*, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary. And it was doubtless this fact conjoined with the subsequent legislation of Congress which led to the

following statement concerning Alaska made in the opinion of three, if not four, of the judges who concurred in the judgment of affirmance in *Downes* v. *Bidwell,* (p. 335):

"Without referring in detail to the acquisition from Russia of Alaska it suffices to say that that treaty also contained provisions for incorporation and was acted upon exactly in accord with the practical construction applied in the case of the acquisition from Mexico as just stated."

Presumably it was also a consideration of the character of the rights conferred by the treaty by which Alaska was acquired, and the legislation of Congress concerning that territory, to which we shall hereafter refer, which caused Mr. Justice Gray, in his concurring opinion in *Downes* v. *Bidwell,* to say (p. 345):

"The cases now before the court do not touch the authority of the United States over the territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii, but they relate to territory in the broader sense, acquired by the United States by war with a foreign state."

That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the act of July 20, 1868, concerning internal revenue taxation, ch. 186, section 107, (15 Stat. 167,) and the act of July 27, 1868, ch. 237, extending the laws of the United States relating to customs, commerce and navigation over Alaska and establishing a collection district therein. (15 Stat. 240.) And this is fortified by subsequent action of Congress, which it is unnecessary to refer to.

Indeed, both before and since the decision in *Downes* v. *Bidwell* the status of Alaska as an incorporated territory was and has been recognized by the action and decisions of this court. By the sixth section of the judiciary act of March 3, 1891, (26 Stat. 826,) it was made the duty of this court to assign the several territories of the United States to particular circuits; and in execution of this law this court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the ninth judicial circuit. (*Steamer Coquitlam* v. *United States,* 163 U. S. 346.) That case was a suit in admiralty, brought by the United States in the District Court of Alaska for the forfeiture of the steamer Coquitlam, because of a violation of the revenue laws of the United States. From a decree rendered in favor of the United States an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. The United States challenged the jurisdiction of the Circuit Court of Appeals upon the grounds: 1. That the District Court of Alaska was not a District Court within the meaning of the sixth section of the judiciary act of 1891, and

was not a District Court belonging to the Ninth Circuit; 2, That the District Court of Alaska was not the Supreme Court of a Territory within the meaning of the order of this court. The Circuit Court of Appeals certified the question of jurisdiction. After fully reviewing the legislation of Congress relating to Alaska and stating the general appellate power of the Circuit Courts of Appeal over judgments and decrees of the District and Circuit Courts, it was decided that under the authority granted to the Circuit Courts of Appeal by the fifteenth section of the judiciary act of March 3, 1891, to review judgments of the Supreme Court of any Territory assigned to such circuit by this court, the Circuit Court of Appeals of the Ninth Circuit possessed appellate jurisdiction over the cause. In the course of the opinion it was declared (p. 352):

"Alaska is one of the Territories of the United States. It was so designated in that order (referring to the order of this court assigning to the ninth circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that territory. It is, therefore, in every substantial sense the Supreme Court of that territory."

In *Binn* v. *United States*, (194 U. S. 486,) the question was this: The penal code for Alaska imposed certain license taxes. The plaintiff in error was convicted for not paying such a tax, and the case was brought to this court on the contention that the act of Congress levying the tax was repugnant to the clause of the Constitution requiring uniformity throughout the United States, as licenses of the character complained of were imposed only in Alaska. After referring to the statements concerning Alaska contained in the concurring opinions in *Downes* v. *Bidwell*, the one written by Mr. Justice Gray and the other by Mr. Justice White, and after approvingly citing the passage from the Coquitlam case above referred to, the court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and hence conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation. The legislation in question was, however, sustained on the exceptional ground that Congress had therein merely exerted its authority as a local legislature for Alaska.

It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the Sixth Amendment.

This brings us to the second proposition, which is—

2d. *That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska.*

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand and the undue limitation on the other of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. (*Webster* v. *Reid*, 11 How. 437; *Reynolds* v. *United States*, 98 U. S. 154; *Callan* v. *Wilson*, 127 Id. 340; *American Publishing Co.* v. *Fisher*, 166 Id. 464; *Springville* v. *Thomas*, 166 Id. 707; *Thompson* v. *Utah*, 170 Id. 345; *Capital Traction Co.* v. *Hof*, 174 Id. 1; *Black* v. *Jackson*, 177 Id. 349.)

The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes and not upon the inherent application of the provisions of the Fifth, Sixth and Seventh Amendments to the District of Columbia or to an incorporated territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the Territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that in some of the opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference

to such statutes was made, and the cases proceeded upon a line of reasoning, leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. (*Springville* v. *Thomas*, 166 U. S. 707; *Thompson* v. *Utah*, 170 Id. 343; *Capital Traction Co.* v. *Hof*. 174 Id. 1; *Black* v. *Jackson*, 177 Id. 349.)

And this result of the cases will be made clear by a brief reference to some of the opinions. In *Thompson* v. *Utah*, considering a law of the State of Utah, which provided that a jury in a criminal cause should consist of only eight persons, the statute was held to be *ex post facto* and void in its application to felonies committed before the territory became a State, "because, in respect of such crimes the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

In *Springville* v. *Thomas* it was contended that the Territorial legislature of Utah was empowered by Congress, in the organic act of the Territory, to dispense with unanimity of the jurors in rendering a verdict in a civil case. The court said (p. 768): "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

Again, in *Capital Traction Co.* v. *Hof*, (174 U. S. 1,) no reference whatever being made to the statute of February 21, 1871, extending the provisions of the Constitution to the District of Columbia, (15 Stat. 419,) it was declared (p. 5): "It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia."

And in *Black* v. *Jackson*, (177 U. S. 349,) speaking of a law of the Territory of Oklahoma, it was said (p. 363):

"And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law, where the value in controversy exceeds $20.' That amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States. (*Webster* v. *Reid*, 11 How. 437, 460; *American Pub. Co.* v. *Fisher*, 166 U. S. 464, 466; *Springville* v. *Thomas*, 166 U. S. 707.) So that a court of a territory authorized, as Oklahoma was, to pass laws not inconsistent with the Constitution of the United States, (26 Stat. at L. 81, 84, chap. 182, sec. 6,) could not proceed in a 'common-law' action as if it were a suit in equity, and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity."

As it conclusively results from the foregoing considerations that the Sixth Amendment to the Constitution was applicable to Alaska, and as of course being applicable it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void. Having disposed of the constitutional question, we deem it unnecessary to review the other alleged errors.

The judgment must therefore be reversed and the case remanded with directions to set aside the verdict and grant a new trial.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 51.—October Term, 1904.

Frederick Rassmussen, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Alaska.

[April 10, 1905.]

Mr. Justice Brown concurring.

I am disposed to concur in the conclusion of the Court upon the ground that, by the treaty of cession with Russia, it was provided that "the inhabitants of the ceded territory shall be admitted to enjoy all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion." I am inclined to think, though with some doubt, that those words include a right to a trial by a jury, as understood among us from the adoption of the Constitution. I certainly should not dissent if the case were put upon that ground.

The tenor of the opinion, however, is such that I should be doing an injustice to myself if I failed to express my views upon the doctrine of incorporation. My position regarding the applicability of the Constitution to newly-acquired territory is contained in the opinion delivered by me in *Downes* v. *Bidwell*, (182 U. S. 244.) It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty and property.

A different view, however, was expressed in a concurring opinion by Mr. Justice White, to the effect that when Congress "incorporated" territory into the United States it resulted that in governing such territory "all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein, . . . and the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory, and its relation to the United States." The question was thus briefly

stated: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" If it had, the inference was that the Constitution applied in all its force.

This, however, was not the opinion of the Court; it was certainly not the opinion of the Justice who announced the conclusion and judgment of the Court; it was wholly disclaimed by the four dissenting Justices, who held that the Constitution applied the moment the territory was ceded and became the property of the United States, and that no act of incorporation was necessary. It was simply the individual opinion of three members of the Court. The point was not pressed upon our attention in the briefs or arguments of counsel in that case. It is but faintly suggested in the briefs in this case. It has never since that time received the endorsement of this Court, and in my opinion is wholly unnecessary to the disposition of this case.

My own view is, and has been, that Congress in dealing with newly-acquired territory is unfettered by the Constitution, unless it formally or by implication extends the Constitution to it; and that it may accept a cession of territory, institute a temporary goverment there, as it has done in a large number of instances, without thereby extending the Constitution over it. In the general act, R. S. Sec. 1891, Congress did declare that "the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the *organized* territories, and in every territory hereafter organized, as elsewhere within the United States." If the act of May 17, 1884, providing a civil government for Alaska, (23 Stat. 24,) be regarded as *organizing* a territory there, it would follow that such territory at once fell within R. S. Sec. 1891, and the Constitution was extended to it without further action. The first article declares that Alaska "shall constitutute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." Had the opinion treated the territory as organized under this act, I should not have dissented from this view, since section 1891 would have applied to it.

Congress did undoubtedly provide a permanent civil government for Alaska by the act of June 6, 1900, (31 Stat. 321,) but it evidently did not regard the Constitution as extended to it by any previous act, since it provided in section 171 for trials of misdemeanors by a jury of six.

There are so many difficulties connected with the applicability of the Constitution that it has seemed to me that the only true test was whether Congress intended to apply it or not in the particular case. When is a territory incorporated so as to make the Constitution applicable in all its provisions? That some action on the part of Congress is necessary to ex-

tend the Constitution to the territories was settled in *Downes* v. *Bidwell*, but shall such action be direct or may it be indirect by way of incorporation? May Congress, in organizing or incorporating a territory, restrict the application of the Constitution to it, or must it give it all? What is an organized as distinguished from an incorporated territory? Does not the acceptance of a cession of territory and the appointment of a civil governor work an incorporation of the territory as territory of the United States? If the acceptance of territory as territory of the United States be not an incorporation, what language is necessary to effect that result? Apparently, acceptance of the territory is insufficient in the opinion of the Court in this case, since the result that Alaska is incorporated into the United States is reached, not through the treaty with Russia, or through the establishment of a civil government there, but from the act of July 20, 1868, concerning internal revenue taxation, and the act of July 27, 1868, extending the laws of the United States relating to the customs, commerce and navigation over Alaska and establishing a collection district there. Certain other acts are cited, notably the Judiciary Act of March 3, 1891, making it the duty of this Court to assign the several territories of the United States to particular circuits. But no mention is made either of the act of May 17, 1884, providing a civil government for Alaska or the act of June 6, 1900, making further provision for a civil government and establishing a complete code of laws. These seem to me the vital acts upon the *status* of Alaska; yet they are completely ignored in the opinion of the Court, and the fact of incorporation is sought to be established by what seem to me remote inferences from immaterial statutes. Indeed I regard the whole theory of the extension of the Constitution by the incorporation of territory as a new departure in Federal jurisprudence, and that the true answer to the question whether the Constitution applies to a territory is to be found in the fact whether Congress has extended the Constitution to it or not.

That the mere act of incorporating territory into the United States does not of its own force carry the Constitution there, regardless of the wishes of Congress, is evident from the case of *Hawaii* v. *Mankichi*, (190 U. S. 197,) wherein it was held that, notwithstanding the island had been annexed to the United States "as a part of the territory of the United States, and subject to the sovereign dominion thereof," yet it was possible for Congress to declare that "the municipal legislation of the Hawaiian Islands not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

While the government provided by this resolution was temporary in its character, and a mere continuance of existing laws, the act itself was as

complete an incorporation of the islands as it was possible for language to make it. The resolution declared that "said cession" of the Republic of Hawaii "is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof." In view of this language I do not see how it is possible to escape the conclusion that there was a plain incorporation by Congress of these islands and an extension of sovereignty over them. Notwithstanding this, however, we held that the conviction of one, who between the date of the Newlands resolution and the date of establishing a civil government, had been tried on information and convicted by a non-unanimous jury, was legal, though not in compliance with the Fifth and Sixth Amendments to the Constitution, upon the ground that the Constitution was not formally extended to them until the territory was organized, June 14, 1900. (31 Stat. 141. sec. 5.) This case shows the impossibility of applying the doctrine of incorporation without an accurate definition of the term. Hitherto we have been content to divide our territories into the organized and unorganized; but now we are asked to introduce a new classification of "incorporated" territories without attempting to define what shall be deemed an incorporation. The word appears to me simply to introduce a new element of confusion and to be of no practical value. R. S., sec. 1891, declaring that the Constitution shall have force and effect within all the organized territories and in every territory hereafter organized, seems to meet the requirements of every case, and to be operative wherever Congress does not in the organization restrict the application of the Constitution in some particular.

In *Dorr* v. *United States*, (195 U.S. 138,) the question was presented, as stated by Mr. Justice Day, whether, "in the absence of a statute of Congress, expressly conferring the right, trial by jury, is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands." In discussing the case it was said that not only has Congress hitherto refrained from incorporating the Philippine Islands into the United States, but in the act of 1902, providing for temporary civil government, (32 Stat. 691,) there was an express provision that R. S. Sec. 1891 should not apply to the Philippine Islands. This is the section giving force and effect to the Constitution of the United States, not locally inapplicable, within the organized territories. The case simply holds that as Congress did not extend the right of trial by jury to the Philippine Islands, and had not so incorporated them as to make the provision apply by implication, the right did not exist. The cases of *Steamer Coquitlam*, (163 U. S. 346,) and *Binn* v. *United States*, (194 U.S. 486,) are too obviously inapplicable to require comment.

I do not dissent from the conclusion of the Court in this case, but I do dissent from the proposition that Congress may not deal with territories as it pleases, until it has seen fit to extend the provisions of the Constitution to them, which, once done, in my view, is irrevocable. I regret that the disputed doctrine of incorporation should have been made the mainstay of the opinion of the Court, when the case might so easily have been disposed of upon grounds which would have evoked no utterance of disapproval.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 51.—October Term, 1904.

Frederick Rassmussen, Plaintiff in Error, *vs.* The United States.	In error to the District Court of the United States for the District of Alaska.

[April 10th 1905.]

Mr. Justice Harlan concurring.

My views in reference to what are called the Insular Questions have been fully expressed in the opinions filed by me in *Downes* v. *Bidwell*, 182 *U. S.* 244, 375; *Hawaii* v. *Mankichi*, 190 *U. S.* 197, 226; *Dorr* v. *United States*, 195 *U. S.* 138, 154. I adhere to what has been said in those opinions, and do not care to restate here the grounds upon which I proceeded in former cases.

The particular question arising in the present case is whether that section of the act of Congress of June 30th 1900, c. 786, relating to Alaska, which provides "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," is consistent with the Constitution of the United States. I content myself in this case with stating only the general reasons for the conclusion which I have reached on that question.

Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that territory, as I think, came under the complete, sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that territory became at once entitled to the benefit of all the guarantees found in the Constitution of the United States for the protection of life, liberty, and property.

After such ratification no person charged with the commission of a crime against the United States in that Territory could be legally tried therefor otherwise than by what this court has adjudged to be the jury of the Constitution.

The constitutional requirement that "the trial of all crimes, except in cases of impeachment, shall be by jury" means, as this court has adjudged, a trial by the historical, common law jury of twelve persons, and applies to all crimes against the United States committed in any territory, however acquired, over which, for purposes of government, the United States has sovereign dominion.

No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution.

Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or by mere non-action, can Congress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States.

The power conferred upon Congress to make needful rules and regulations respecting the territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument.

The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions.

If the Constitution does not become the supreme law in a territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by non-action, Congress, under the theory of "incorporation," and although a mere creature of the Constitution, could forever withhold from the inhabitants of such Territory the benefit of the guaranties of life, liberty and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress.

As these are my views upon the underlying questions presented by the record, I cannot concur in all the reasoning in the opinion of the court. But I entirely concur in the judgment holding the act of Congress in question to be void. I do so, not upon the ground that Alaska had been previously "incorporated" into the United States by the legislation of Congress, but upon the ground that the right of the accused to a trial by the jury of the Constitution became complete immediately upon the acquisition of Alaska by treaty, and before any legislation upon the subject by Congress—indeed, without any power in Congress to add to or impair or destroy that right.

True copy.

Test:

Clerk Supreme Court, U. S.